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U.S. Bankruptcy Appellate Panel of the Tenth Circuit

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NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL

OF THE TENTH CIRCUIT

IN RE DOUBLE J CATTLE CO., a partnership, Debtor.	BAP No. WY-97-029
GEORG JENSEN, Appellant, v. UNITED STATES TRUSTEE, Appellee.	Bankr. No. 95-20112 Chapter 7 ORDER AND JUDGMENT*

Appeal from the United States Bankruptcy Court
for the District of Wyoming

Georg Jensen, pro se.

Paul Hunter, Assistant United States Trustee, Cheyenne, Wyoming (Barbara Shangraw, United States Trustee, Denver, Colorado, with him on the brief) for Appellee.

Before CLARK, BOULDEN and CORNISH, Bankruptcy Judges.

BOULDEN, Bankruptcy Judge.

Georg Jensen (Jensen), the attorney for the now converted Chapter 7 debtor Double J Cattle Company (Debtor), appeals an order of the United States Bankruptcy Court for the District of Wyoming denying Jensen's Request for Payment of Attorney's Fees (Application) sought pursuant to 11 U.S.C. § 330.

* This order and judgment has no precedential value and may not be cited, except for the purposes of establishing the doctrines of law of the case, res judicata, or collateral estoppel. 10th Cir. BAP L.R. 8010-2.

Because we determine that the Bankruptcy Court erred in its application of 11 U.S.C. §§ 330(a)(1)(A) and (B), and (a)(4)(A)(ii),[1] for allowance of compensation for a professional person employed under § 327, we reverse.

BACKGROUND

The Debtor filed a petition seeking relief under Chapter 12 of the Bankruptcy Code in February 1995, under the good faith assumption that, as a partnership, it was eligible to file under Chapter 12 pursuant to § 101(18)(B). Jensen was appointed as counsel for the Debtor.[2] The Debtor and its secured lender, First National Bank of Worland (Bank), engaged in protracted litigation during the nineteen months while this case was administered under Chapter 12. The docket reflects contested proceedings related to cash collateral, stay lift, financing, dismissal, an attempt to remove the Debtor as debtor in possession, sales of estate property, contempt, conversion, and an appeal, all indicating the contentious nature of the Chapter 12 case. Jensen asserts that he prevailed in the majority of these contested matters, a contention supported by the bankruptcy court docket included in the record on appeal.

The Debtor initiated two adversary proceedings during the pendency of the Chapter 12 case. In one adversary proceeding, the Debtor successfully avoided a lien on livestock and recovered a preferential transfer. The lienholder's appeal from that proceeding is still pending. The Debtor also brought claims against the Bank and twenty-one other defendants to determine the validity of the Bank and other parties' liens and to fix the value of their collateral, which also remain pending.

On September 12, 1997, approximately seventeen months after the petition

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[1] Future references are to Title 11 of the United States Code unless otherwise noted.

[2] The dissenting opinion concludes that the Application must have, implicitly or expressly, misrepresented the Debtor's authority to employ Jensen. Such a conclusion is unsupported by any document in our record or argument made by the parties in this appeal.

was filed, Jensen timely filed the Application. The Application seeks $41,179 in compensation for professional services and $1,755.81 in reimbursement of expenses, and indicates it is Jensen's final application for fees and expenses. The Application was divided into categories itemizing time spent for general administration of the estate, asset disposition, financing, litigation, claims administration and objections, relief from stay proceedings, plan and disclosure statement, meeting of creditors, and preparation of fee and employment applications. Itemized expenses included the filing fees for the Chapter 12 case and adversary proceedings, travel costs, copies, postage, phone conferences, and overnight delivery charges. The United States Trustee, the Chapter 12 Trustee William M. Bass (Bass), and the Bank filed objections to the Application. The Application was never set for hearing.

In August 1996, the Bankruptcy Judge originally assigned to the case recused himself and a judge from a different district was assigned to the case, as is the ordinary course in the District of Wyoming (where only one bankruptcy judge is available for case assignment). The following month the Bank filed a motion to convert the case from Chapter 12 to Chapter 7. The Bankruptcy Court heard the motion to convert, granted the motion by Minute Order dated September 30, 1996, and Bass was appointed as the Chapter 7 Trustee.

Although the case had been converted, the adversary proceeding against the Bank and other defendants remained unresolved. To settle the adversary proceeding, Bass obtained the agreement (Stipulation) of the Bank and Jensen that provided, among other things, that both Jensen and the Bank would reduce their administrative claims by fifty percent. The funds on hand would then be distributed to administrative claimants in a pro rated amount of slightly less than 40 percent of their claims. Bass determined $56,631.96 was available for distribution to creditors after payment of his commission and auctioneer fees. Under the terms of the Stipulation, Jensen would be paid approximately 40 per

cent of $21,467.41, or $8,239.94. Bass filed a motion to approve the Stipulation in the adversary proceeding, and also incorporated the terms contained in the Stipulation in a Trustee's Motion for Approval of Proposed Final Report that implemented the 40 percent pro rata distribution to administrative claimants.

The United States Trustee objected to Bass's final report on the ground, among others, that it proposed to pay Jensen's fees, but Jensen had not yet obtained court approval for allowance of his Application. The Bankruptcy Court issued its own Order for Hearing on the Stipulation. Although a copy of the Order for Hearing on the Stipulation is not included in the record on appeal, it apparently expressed the Bankruptcy Court's concern that the Chapter 12 case was improperly filed because the Debtor partnership was ineligible for Chapter 12 relief.

In April 1997, the Bankruptcy Court held a telephonic hearing on the Stipulation and on Bass's final report. The Bankruptcy Court refused to approve the Stipulation because approval of the Stipulation would require approval of the Application. The Bankruptcy Court's reason for denying approval of the Stipulation was announced on the record and resulted in the order appealed to this Court.

In its ruling refusing to approve the Stipulation and denying the Application, the Bankruptcy Court stated that the partnership Debtor was not eligible for relief under Chapter 12, although Jensen's choice of Chapter 12 relief for the Debtor rather than Chapter 7 or 11 was in good faith. The Bankruptcy Court rejected as irrelevant Jensen's argument that if the Debtor was not eligible for Chapter 12 relief it would have filed or would have converted to a case under Chapter 11 had the issue of eligibility been raised earlier in the case. Maintaining that this argument was "not significant," the Bankruptcy Court indicated that it did not believe that the Debtor would have filed Chapter 11, stating "the reason it's in a 12 instead of an 11 is because there clearly was no

equity in the debtor . . . so if there had been any prospect for reorganization it was going to have to be under a completely bootstrapped cramdown kind of plan, the prospects for which are remote." Appellant's Appendix, Attachment 2, Transcript, p. 11. Accordingly, the Bankruptcy Court determined the case should have been filed under Chapter 7.

The Bankruptcy Court also rejected Jensen's argument that his efforts raised the only money to be distributed from the estate, stating that while that might be true, there was no benefit to prepetition creditors, who would not receive any distribution from this estate. Regardless of Jensen's unintentional error, the Bankruptcy Court determined that the fees generated by Jensen's representation of the Debtor during the course of the contentious Chapter 12 case were of no benefit to creditors because the case had been filed under the wrong chapter.

In its ruling, the Bankruptcy Court did not comment on any specific itemized time entries contained in the Application. The ruling did not indicate whether any of the services itemized in the Application were reasonably likely to benefit the estate, just that they had not. The Bankruptcy Court did not state whether any of the services set forth in the Application were or were not necessary to the administration of the case. Neither did the Bankruptcy Court make specific reference to the expenses requested in the Application, except to disallow them along with the fees requested in the Application.

The Bankruptcy Court stated that:

> And Mr. Jensen pleads that the monies that are available in this estate were raised by reasons of his efforts. Well, those efforts didn't benefit the creditors of this estate. The creditors got nothing.
>
> . . .
>
> I cannot approve this stipulation. My view of what went on in this case, that what improperly went on is so strong, particularly in light of the fact that what I'm told is, "We carried on all this litigation, all these efforts, and when we're all done we can't afford to pay the claims of the administrative claimants." Something's wrong. What is wrong is that the case never should've been prosecuted in the first instance. So, Mr. Bass, I

will not approve the stipulation that's been tendered.

> That leaves us then with the issue of the motion that is outstanding for the payment of fees to Mr. Jensen, and the objections that have been filed. And we can set that down for a hearing Mr. Jensen, if you so desire, to make a record. And you're entitled to do that. Making that record, I can assure you, is not going to change my views, because I have to express those views in ruling on the stipulation. If you don't, an order will enter denying the fees pursuant to the findings made today, and you'll have your order, and you can expedite your appeal.

Appellant's Appendix, Attachment 2, Transcript, pp. 11-15.

Jensen did not avail himself of the opportunity to set the Application for further hearing to establish a record for appeal regarding the issue of whether his services were reasonably likely to benefit the estate or whether the services were necessary for the administration of the case. The Bankruptcy Court entered an Order Denying Request for Payment of Attorney Fees and Judgment (Fee Order). This appeal of the Fee Order followed.

LEGAL STANDARDS

A. Jurisdiction and Standard of Review.

This Court, with the consent of the parties, has jurisdiction to hear appeals from "final judgments, orders and decrees" of bankruptcy courts within the Tenth Circuit. 28 U.S.C. § 158(a)(1), (b)(1) and (c)(1). The parties have consented to this Court's jurisdiction in that they have not opted to have the appeal heard by the United States District Court for the District of Wyoming. *Id*. at § 158(c); 10th Cir. BAP L.R. 8001-1(a) and (e).

The parties apparently believe that the Fee Order is a final order in that Jensen has not sought leave of Court to appeal, and the United States Trustee has not sought to dismiss the appeal for lack of jurisdiction or otherwise raised the issue. *See* 28 U.S.C. § 158(a)(3); Fed. R. Bankr. P. 8003 and 8011; 10th Cir. BAP L.R. 8011-1. Prior to the conclusion of a case, orders regarding fee applications are typically not "final" for purposes of appeal. *See Spears v. United States Trustee,* 26 F.3d 1023, 1024 (10th Cir. 1994) (citing *Callister v. Ingersoll-Rand Fin. Corp. (In re Callister),* 673 F.2d 305, 307 (10th Cir. 1982)).

The reason for this rule is that fee orders are, until the conclusion of a case, interim in nature. However, it is appropriate to employ a practical test to determine whether an order for compensation is effectively final where the order conclusively fixes the entire compensation to be paid to the appellant. *See Boddy v. United States Bankr. Court (In re Boddy)*, 950 F.2d 334, 336 (6th Cir. 1991); *In re Delta Petroleum (P.R.), Ltd.*, 193 B.R. 99, 105 (D.P.R. 1996). It is evident from the record and the argument of counsel that the Fee Order involves a final fee application and conclusively determines Jensen's compensation. Therefore, the Fee Order should be treated as final and is immediately appealable.

A bankruptcy court's award of attorney's fees will not be disturbed on appeal absent an abuse of discretion or an erroneous application of the law. *Rubner & Kutner, P.C. v. United States Trustee (In re Lederman Enters., Inc.)*, 997 F.2d 1321, 1323-24 (10th Cir. 1993).[3] *See also Jensen v. United States Trustee (In re Smitty's Truck Stop, Inc.)*, 210 B.R. 844, 846 (10th Cir. BAP 1997); *Pfeiffer v. Couch (In re Xebec)*, 147 B.R. 518, 522 (9th Cir. BAP 1992). "However, any statutory interpretation or other legal analysis underlying the [trial court's] decision concerning attorney fees is reviewed de novo." *Octagon Resources, Inc. v. Bonnett Resources Corp. (In re Meridian Reserve, Inc.)*, 87 F.3d 406, 409 (10th Cir. 1996). As discussed below, this Court reviews the Fee Order de novo based on the Bankruptcy Court's error in applying § 330(a)(1)(A) and (B) and (a)(4)(A)(ii)(I) and (II) to Jensen's Application.

B. Allowance of Compensation Under § 330.

The Bankruptcy Reform Act of 1994, Pub. L. 103-394, title I, § 117, title II, § 224(b), 108 Stat. 4119, 4130, clarified many of the judicial standards and

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[3] In *Lederman*, the Tenth Circuit: (1) applied de novo review as to the issue of whether the bankruptcy court applied the appropriate legal standard under former § 330; (2) applied a clearly erroneous standard to the bankruptcy court's factual finding that the services rendered did not benefit the estate; and (3) applied an abuse of discretion standard in determining whether the bankruptcy court erred in refusing to award fees for unnecessary work.

practices regarding the allowance of professional fees. *Ferrara & Hantman v. Alvarez (In re Engel)*, No. 96-5256, 1997 WL 539673, at *n.10 (3d Cir., Sept. 3, 1997); *Delta Petroleum*, 193 B.R. at 108; *In re Holder*, 207 B.R. 574 (Bankr. M.D. Tenn. 1997) (new § 330(a)(3) codifies the existing case law regarding allowance of compensation). The 1994 modifications to § 330 retained the language of the 1978 Code authorizing compensation for "actual, necessary services rendered by the . . . attorney," but codified what courts had previously held were the tests to determine what were "necessary" compensable services. In *Lederman*, the Tenth Circuit articulated a standard that prohibited courts from conducting a reasonableness inquiry until they had determined the beneficial nature of legal services as an element of whether the services were "necessary." *See Lederman*, 997 F.2d at 1323. Section 330(a)(4)(A)[4] now states that one element of "necessary" is that services must be "reasonably likely to benefit the debtor's estate." New § 330(a)(4)(A)(ii)(I) is consistent with *Lederman*, but adds another consideration: that the services be "reasonably likely" to benefit the estate. Courts cannot limit their inquiry to an evaluation of whether the services actually benefitted the estate. Instead, the court must make a determination whether or not it was reasonably probable or likely that the services would benefit the estate.

Furthermore, the 1994 amendments added another evaluative element to § 330(a)(4)(A)(ii)(II), one that is not a new concept but merely a codification of existing judicial practice and precedent. In *Canatella v. Towers (In re Alcala)*,

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[4] Section 330(a)(4)(A) states:

> Except as provided in subparagraph (B), the court shall not allow compensation for --
>
> (i) unnecessary duplication of services; or
>
> (ii) services that were not --
>
> (I) reasonably likely to benefit the debtor's estates; or
>
> (II) necessary to the administration of the case.

11 U.S.C. § 330(a)(4)(A).

918 F.2d 99 (9th Cir. 1990), which was the ruling followed by *Lederman*, the court determined that whether debtor's counsel's services were "necessary services" depended on whether the services benefitted the estate but also whether the services were necessary for the administration of the estate. *Alcala*, 918 F.2d at 103-04. Section 330(a)(4)(A)(ii)(II) now contains the second element applied by *Alcala*. Whether services are "necessary," and therefore compensable, now includes a determination whether services were necessary to the administration of the case.[5]

A recent appellate opinion has summarized the effect of Section 330(a)(4)(A)(ii) as follows:

> Furthermore, while in general bankruptcy courts have wide discretion in the awarding of compensation, new subsection (a)(4) bars them from granting awards under certain circumstances, and thus circumscribes the courts' discretion. . . .
>
> The key question is what is meant by "necessary" services. Even though this term is not defined in the statute, a close reading of subsection (a)(4)(A) sheds light on it. A service is not "necessary" if it is: unnecessarily duplicative, § 330(a)(4)(A)(I); not "reasonably likely to benefit the debtor's estate," § 330(a)(4)(A)(ii)(I); or not "necessary to the administration of the estate," § 330(a)(4)(A)(ii)(II). Thus, by negative implication, a bankruptcy judge may award compensation for services that were: reasonably likely to benefit the estate, necessary to its administration, or not unnecessarily duplicative.

Delta Petroleum, 193 B.R. at 108.

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[5] The 1994 amendments also contain specific, but not exclusive, criteria to fix the amount of the fee award after a court determines that compensation is proper. The amounts to be awarded are evaluated under the new § 330(a)(3) which codifies a list of factors and adopts into statutory form the modified lodestar method for measuring appropriate compensation. *Delta Petroleum*, 193 B.R. at 108. Prior to the 1994 amendments, the Tenth Circuit had established certain criteria for determining the amount of fees in *First Nat'l Bank v. Niccum (In re Permian Anchor Servs., Inc.)*, 649 F.2d 763 (10th Cir. 1981) (adopting twelve standards set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974)); *see also In re Gillett Holdings, Inc.*, 137 B.R. 475, 480-81 (Bankr. D. Colo. 1992). Those twelve standards arose from cases involving attorney fees requested under § 706(k) of Title VII of the Civil Rights Act of 1964 and were somewhat awkward to apply in bankruptcy cases. One court continues to apply both the *Johnson* factors and § 330(a)(3). *In re Spanjer Bros., Inc.*, 191 B.R. 738 (Bankr. N.D. Ill. 1996); *In re Word of Faith Fellowship, Inc.*, No. 95 B 24148, 1997 WL 527852, at *3 (Bankr. N.D. Ill., Aug. 26, 1997).

DISCUSSION

A. The Bankruptcy Court Failed to Apply the Standards set Forth in § 330(a)(1)(A) and (B) and (a)(4)(A)(ii).

The record on appeal contains the Bankruptcy Court's docket, which supports Jensen's assertion that he prevailed on the majority of issues presented to the Bankruptcy Court, but the record contains no specific indication of why prevailing on such issues were reasonably likely to have benefitted the estate or were necessary to the administration of the case. At oral argument before this Court, Jensen indicated he was concerned that, under the circumstances, he would have been sanctioned for asking for a separate hearing on the Application where he could have created a more complete evidentiary record. However, a more complete record is unnecessary for us to determine that the Bankruptcy Court erred in totally disallowing Jensen's fees without reviewing the content of the Application and applying to it the provisions of § 330(a)(1).[6]

The record does not indicate that any consideration was given to whether the services were "reasonably likely" to benefit the estate, as opposed to a

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[6] The dissenting opinion states that the majority shifts the burden of proof from Jensen to the Bankruptcy Court because Jensen was "given every opportunity" to meet his burden of proof as to why his services benefitted the estate. The Bankruptcy Court ruled on Jensen's Application at a hearing on approval of the Stipulation, not at a hearing noticed for the purpose of scrutinizing Jensen's Application. We do not have the Order for Hearing in the record on appeal, and to assume it placed Jensen on notice that the hearing on the Stipulation was, in fact, a hearing on his Application is is not supported by the record. The objection to the Application filed by the United States Trustee complains of thirteen specific time entries, application of a retainer, and services related to the Debtor's partners. The objection filed by Bass only informed the Court that insufficient funds were available to pay the administrative expense claims. None of the objections placed Jensen on notice that his entire fees and expenses were being challenged.

After summarily ruling to totally disallow Jensen's fees and costs, the Bankruptcy Court invited Jensen, not to present evidence designed to meet his burden of convincing the Bankruptcy Court of the benefit of his efforts (for that had already been ruled upon), but to augment the record solely for the purpose of appeal. It is difficult to perceive how Jensen's decision not to pursue a separate hearing on a matter where the decision had already been made, constitutes a shift of the burden of proof from Jensen to the Bankruptcy Court. The only burden placed upon the Bankruptcy Court is to make findings that apply the Code to the facts of the case.

determination that there was no actual benefit.[7] The Application was not evaluated to determine whether the services were necessary to the administration of the case. The Bankruptcy Court did not review the content of the Application to determine if any of the time entries, such as time spent preparing the schedules, attending the § 341 meeting, responding to creditors, resolving claims, prosecuting lien avoidance actions, or litigating the successful preference action, were necessary to the administration of the case.

Instead, the Fee Order was premised upon a *per se* rule that because there was no return to pre-petition creditors and because there was no equity in the Debtor's assets the case could only have been filed as a Chapter 7. The Bankruptcy Court's conclusion that Jensen's Application should be denied because there was no distribution for unsecured creditors reflects a misplaced emphasis on the concept of "benefit to the estate." As stated in *Holder*, "[t]he concept of 'benefit to the estate' is not restricted to an economic dollar for dollar interpretation." 207 B.R. at 584 (citing *In re Spanjer Bros., Inc.*, 203 B.R. 85 (Bankr. N.D. Ill. 1996)). As explained in *Spanjer Brothers*, "'[b]enefit to the

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[7] We must presume that the Bankruptcy Court reviewed the Application considering Jensen to be a professional appointed under § 327 to represent the debtor in possession, and not as an attorney providing services for a partnership Chapter 12 debtor. The 1994 amendments to the Code, after deleting the reference to distribution of funds of the estate to the debtor's attorney, added § 330(a)(4)(B) which reinstated the ability for court's to grant payment from funds of the estate to Chapter 12 and 13 debtor's attorneys for representation of the debtor under certain circumstances. Section 330(a)(4)(B) states:

> In a chapter 12 or chapter 13 case in which the debtor is an *individual*, the court may allow reasonable compensation to the debtor's attorney for representing the interests of the debtor in connection with the bankruptcy case based on a consideration of the benefit and necessity of such services to the debtor and the other factors set forth in this section.

11 U.S.C. § 330(a)(4)(B) (emphasis added).

See In re French, 139 B.R. 485, 488 n.3 (Bankr. D.S.D. 1992) (under § 323 the trustee represents the estate, and any reference to a trustee applies to a Chapter 12 petitioner acting as debtor in possession which shall have all the rights of a trustee serving in a case under Chapter 11, including the right to employ a professional person with court approval).

estate' is not necessarily limited to an economic approach along the line that a dollar's worth of services must directly benefit the estate and bring a cash dollar into the estate in order to justify allowance of such dollar in cash compensation. . . . [O]ther factors besides the economic impact on the estate of actions taken should be considered in the 'benefit to the estate' analysis." *Spanjer Bros.*, 203 B.R. at 90 (discussing *In re Lifschultz Fast Freight, Inc.*, 140 B.R. 482, 488 (Bankr. N.D. Ill. 1992), a 1992 opinion that traced the evolution of § 330). *See also Lobel & Opera v. United States Trustee (In re Auto Parts Club, Inc.),* 211 B.R. 29, 34-35 (9th Cir. BAP 1997) (sustaining reduction in fees where unsecured creditors would not receive a distribution, but noting that applicant could have been awarded fees despite the lack of distribution to unsecured creditors had the applicant scaled back its efforts once it became reasonably obvious unsecured creditors would receive no distribution).

If the Bankruptcy Court had evaluated Jensen's services in light of the criteria contained in § 330(a)(4)(A)(ii)(I) and (II), it is possible that a different result might have occurred and some of Jensen's fees could have been allowed. Conversely, the Bankruptcy Court might have reached the same result and denied all of Jensen's fees.[8] Whatever the result would have been, it was error

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[8] The dissenting opinion creates a new theory for disallowance of Jensen's fees not raised by the parties: that Jensen breached his fiduciary duty to the estate and engaged in sanctionable conduct under Fed. R. Bankr. P. 9011 by signing the petition seeking relief under the wrong chapter. The case law cited as authority for this position is *Bill Parker & Assocs. v. Hope (In re Dalton),* 101 B.R. 820, 821 (M.D. Ga. 1989), a case that denied fees under § 329(b), not Fed. R. Bankr. P. 9011. However, assuming *arguendo* that Jensen's conduct was sanctionable even in light of the Bankruptcy Court's finding that Jensen's actions were in good faith, and that Jensen was afforded his fundamental right to due process by receiving notice that he may be sanctioned under Fed. R. Bankr. P. 9011, *Styler v. Tall Oaks, Inc. (In re Hatch),* 114 B.R. 747, 748 (D. Utah 1989) (bankruptcy court erred in imposing sanction without notice and hearing in violation of right to due process), the Fee Order cannot be affirmed based upon a Fed. R. Bankr. P. 9011 theory.

To impose sanctions under Fed. R. Bankr. P. 9011, the Bankruptcy Court must have complied with the ruling in *White v. General Motors Corp.*, 908 F.2d 675 (10th Cir. 1990) (setting forth the standards that must be applied by a court

(continued...)

not to apply the standard in § 330(a)(4)(A)(ii)(I) and (II) to the Bankruptcy Court's determination of whether the services itemized in the Application were necessary services.[9]

The record also does not indicate any factual review of, or basis for, denial of the $1,755.81 sought by Jensen pursuant to § 330(a)(1)(B) as reimbursement of actual, necessary expenses. The Bankruptcy Court's ruling does not indicate why the expenses were disallowed, merely that the entire Application was disallowed.

B. The Law of the Case Doctrine is Inapplicable to the Fee Order.

Jensen also argued in this appeal that the Bankruptcy Court was precluded by the "law of the case" doctrine from denying the Application. Jensen asserts that the Bankruptcy Court's ruling implicitly reversed the succession of rulings made by the judge originally assigned to the case in the Debtor's favor over the 18-month period prior to conversion to Chapter 7, including creditors' motions to dismiss or convert. *See Gage v. General Motors Corp.*, 796 F.2d 345, 349 (10th Cir. 1986). "Law of the case rules have developed to maintain consistency and

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[8] (...continued)
when imposing sanctions under Fed. R. Civ. P. 11), *cert. denied*, 498 U.S. 1069 (1991); *see also Masunaga v. Stoltenberg (In re Rex Montis Silver Co.)*, 87 F.3d 435 (10th Cir. 1996) (three *White* factors must be considered when determining the amount of Fed. R. Bankr. P. 9011 sanctions, and indicating the additional factors the court may consider). The Bankruptcy Court did not make the findings that are mandatory under *White* when it denied Jensen's fees and costs. Were this Court to sustain the Bankruptcy Court's Fee Order as a Fed. R. Bankr. P. 9011 sanction, the factual findings required by *White* would have to be made by *this* Court. We have no record upon which to base such findings and to attempt to do so exceeds our authority as an appellate court.

[9] The dissenting opinion views remand as a useless exercise because the only record before the Bankruptcy Court would be the Application and a transcript of the hearing on the approval of the Stipulation. Instead, the Bankruptcy Court has before it all the pleadings filed in the case since 1994, plus a familiarity with the case gained during the nine months this Judge was responsible for the case. Upon remand, if in fact the Order for Hearing provided sufficient notice, the Bankruptcy Court need only review the merits of the Application in light of those pleadings filed in the case over its two and one-half year history and apply § 330 compensation criteria to the Application.

avoid reconsideration of matters once decided during the course of a single continuing lawsuit." 18 Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, *Federal Practice and Procedure* § 4478 (1981). "'[W]hen a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.' . . . This principle applies to all 'issues previously decided, either explicitly or by necessary implication.'" *Rohrbaugh v. Celotex Corp.*, 53 F.3d 1181, 1183 (10th Cir. 1995) (citations omitted). *See also Pittsburg & Midway Coal Mining Co. v. Watchman*, 52 F.3d 1531 (10th Cir. 1995) (once a court decides an issue, doctrine prevents relitigation of issue in subsequent proceedings in same case).

The flaw in Jensen's argument is the presumption that the Bankruptcy Court made any previous determination, either explicit or implicit, regarding the allowance of Jensen's Application for compensation under § 330. The Application was Jensen's first and final request for allowance of fees and the Bankruptcy Court's first opportunity to determine whether Jensen's professional services were necessary and reasonable. As an experienced bankruptcy practitioner, Jensen is aware that appointees under § 327 run the risk of non-payment if the court later determines that the estate was not reasonably likely to benefit from the services or the services were not necessary to the administration of the case. A bankruptcy court cannot be required to make the determination that a professional's services are compensable before those services have been rendered. *Engel*, 1997 WL 539673, at *8. The continued administration of this case under Chapter 12 until the time the Bank's motion to convert was granted was not tantamount to approval of Jensen's fee request. To the extent Jensen's law of the case argument implies that the prior judge ruled on the Debtor's eligibility to file under Chapter 12, we have not been provided with any ruling so holding. Under these circumstances, the law of the case doctrine does not control the resolution of this appeal.

CONCLUSION

The Fee Order is reversed and the matter remanded to the Bankruptcy Court with direction to review the Application applying the standards set forth in § 330(a)(4)(ii)(I) and (II), and to review the expense Application pursuant to § 330(a)(1)(B) to determine if any of the expenses requested are reimbursable as actual, necessary expenses of the estate.

CLARK, Bankruptcy Judge, dissenting.

Although the majority's interpretation of section 330(a) may be accurate, it is irrelevant in this case because, based on the undisputed facts, Jensen should not be compensated from the estate since he breached his fiduciary duty to the estate or, alternatively, was employed by a debtor in possession who was not eligible for relief under Chapter 12 and, therefore, had no authority to employ him under section 327(a). Even if section 330(a) could be said to apply, however, the Bankruptcy Court should be affirmed because Jensen did not meet his burden of showing that his services were compensable under any interpretation of that section. Furthermore, when the undisputed facts and the record are viewed as a whole, the Bankruptcy Court did not abuse its discretion in denying Jensen compensation or reimbursement of expenses from the estate, even under the majority's interpretation of section 330(a). Accordingly, I respectfully dissent.

The record indicates that the Bankruptcy Court denied Jensen's fees based primarily on the undisputed fact that he filed a Chapter 12 case for debtors who did not, as a matter of law, qualify for relief under that chapter, and spent approximately one and one-half years administering the case in the wrong chapter. Appellant's Appendix, Attachment 2, Transcript, at pp. 3-4 and 11-14. The Bankruptcy Court also found it significant that administration of the case under the wrong chapter generated numerous administrative expense claims, the largest of such claims belonging to Jensen and the Debtor's secured lender. *Id*. at 12. Such claims were to be paid on a *pro rata* basis and no return was to be made to unsecured creditors at all. *Id*. at 11-12. The fact that no return was to be made to unsecured creditors was important to the Bankruptcy Court, but in no way did the Bankruptcy Court apply a *per se* rule. *See* Slip Op. at 11. In addition, the Bankruptcy Court made so many conflicting remarks as to the issue of whether the case could be considered a Chapter 11 case or should be considered a Chapter 7 case that they should not be given considerable weight on

review, much less deemed to be part of a *per se* rule. *See id.*[1]

The primary and undisputed fact relied on by the Bankruptcy Court, that Jensen filed this case under Chapter 12 for a debtor who was not eligible for such relief as a matter of law, compels me to believe that this Court should affirm the Bankruptcy Court, regardless of section 330(a), because Jensen breached his fiduciary duty to the estate. This Court has held that counsel for a debtor in possession has a fiduciary duty to the estate, requiring that he or she exercise independent professional judgment on behalf of the estate. *Jensen v. United States Trustee (In re Smitty's Truck Stop, Inc.)*, 210 B.R. 844, 850 (10th Cir. BAP 1997); *see Interwest Bus. Equip., Inc. v. United States Trustee (In re Interwest Bus. Equip., Inc.)*, 23 F.3d 311, 316 n.9 (10th Cir. 1994) (debtor in possession is also a fiduciary of the estate). Failure to properly exercise that independent professional judgment may result in a total denial of fees. *Smitty's Truck Stop*, 210 B.R. at 850. Counsel's fiduciary duty includes its responsibility to disclose any actual or potential conflicts of interest with the estate, *id.*, and must also include a responsibility to evaluate the facts of the case and the law to determine whether a debtor is eligible for relief under the chapter of the Bankruptcy Code which the petition is filed. Indeed, this latter responsibility is compelled by section 301, the Official Forms, and Fed. R. Bankr. P. 9011(a). Section 301 states, in relevant part, that "[a] voluntary case under a chapter of this title is commenced by the filing . . . of a petition under such chapter *by an entity that may be a debtor under such chapter*." 11 U.S.C. § 301 (emphasis added). When

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[1] *See also* Appellant's Appendix, Attachment 2, Transcript, at p. 4 (noting that if case had been a chapter 7 case, Jensen would not be entitled to any fees under section 330); p. 10 (whether case could have been a chapter 11 case or anything else is "not significant"); p. 11 (indicating that case was probably not appropriate for chapter 11 because there was no equity in the Debtor's assets); p. 12 ("We don't know what might have happened had the case been filed in another Chapter. . . . And I can't speculate as to what the result might have been had the case been properly filed in the first instance. I can only deal with what is."); p. 13 ("I think I must treat this case as a Chapter 7, because it certainly is not properly treated as a Chapter 12.").

counsel for a debtor signs a voluntary petition, he or she verifies that the "[d]ebtor is eligible for . . . the chapter of title 11, United States Code, specified in this petition." Official Form No. 1. Counsel's signature on the petition is expressly required under Fed. R. Bankr. P. 9011(a) and--

> constitutes a certificate that the attorney . . . has read the document; that to the best of the attorney's . . . knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation or administration of the case. . . . If a document is signed in violation of this rule, the court on motion or on its own initiative, shall impose on the person who signed it . . . an appropriate sanction . . . .

Fed. R. Bankr. P. 9011(a). To overlook an attorney's failure to consider eligibility requirements prior to signing and filing a voluntary petition makes a mockery out of the bankruptcy process. Thus, an attorney who signs a voluntary petition verifying that a debtor is eligible for the relief sought when, in fact, it clearly is not, is not entitled to compensation or reimbursement of expenses from the estate as a matter of law. *Bill Parker & Assocs. v. Hope (In re Dalton),* 101 B.R. 820, 821 (M.D. Ga. 1989) (bankruptcy court's denial of attorney fees was not error based on findings that services rendered did not meet even minimum standards of practice as counsel failed to verify the accuracy of the debtors' petition before it was filed); *see* 3 *Collier on Bankruptcy* ¶ 330.02[1][c] (Lawrence P. King, ed., 15th ed. rev. 1996) ("Absent compliance with the Code or Bankruptcy Rules, there is no right to compensation."). As the Bankruptcy Court correctly explained:

> I think there also is a very heavy premium that has to be paid to see to it that the professionals who bring these cases to the Court do so in a responsible manner. This was such a fundamental threshold issue, when you have a partnership walk in the door, two men who say they want to file bankruptcy, to open the book and look and see whether they are qualified at all to be in Chapter 12 . . . .

Appellant's Appendix, Attachment 2, Transcript, p. 13.

I acknowledge that there will be cases in which eligibility under a

particular chapter of the Bankruptcy Code may not be clear. In such cases, it is the duty of the debtor in possession or trustee and its counsel to bring this fact to the attention of the bankruptcy court in a timely fashion. If it is ultimately decided that the debtor is not eligible for relief under a particular chapter, the filing of the petition will not be a breach of fiduciary duty and will not be sanctionable provided that the standards in Fed. R. Bankr. P. 9011(a) have been met.

This case, however, is not such a case. Section 109, entitled "[w]ho may be a debtor," expressly states that "[o]nly a family farmer with regular annual income may be a debtor under chapter 12 of this title." 11 U.S.C. § 109(f). The term "family farmer" is defined, in relevant part, in the "[d]efinitions" section of the Bankruptcy Code as a "partnership in which more than 50 percent of the outstanding stock or equity is held by one family, or by one family and the relatives of the members of such family . . . ." 11 U.S.C. § 101(18)(B). It is undisputed that the Debtor was never eligible for relief under Chapter 12 as it was not a "family farmer" as defined in section 101(18)(B).[2] Thus, it is clear that Jensen either failed to talk to his client to determine whether it was a "family farmer," or failed to look at the provisions of the statute governing his case, or both. In so doing, he engaged in sanctionable conduct and breached his fiduciary duties to the estate. This case is no different from one in which an individual is

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[2] At oral argument Jensen argued that, contrary to the Bankruptcy Court's findings, the Debtor may have been eligible for chapter 12 relief. These self-serving statements should not be considered on appeal in light of the following: (1) Jensen did not appeal the Bankruptcy Court's order converting the Debtor's case to chapter 7 based on the fact that the Debtor was not eligible for chapter 12 relief; (2) the record before this Court does not indicate any attempt by Jensen to preserve the issue of eligibility for appeal and, in fact, the record shows that some parties in interest, including Jensen, conceded that the Debtor was not eligible for chapter 12 relief before the Bankruptcy Court; *see* Appellant's Appendix, Attachment 2, Transcript, pp. 4 and 7-8; and (3) as discussed in more detail below, Jensen was given an opportunity by the Bankruptcy Court to have a hearing regarding his entitlement to compensation and reimbursement of expenses, at which time he might have established a record regarding issues related to eligibility, but he stated that such a hearing was not necessary.

advised by an attorney to file for relief under Chapter 9. Surely, fees and expenses in such a case would not be payable to debtor's counsel.

Furthermore, as a result of Jensen's failure to file a case under an appropriate chapter, his employment was impaired which, in turn, requires a denial of fees as a matter of law. For section 330(a) to apply, one must presume that Jensen is a professional employed by a debtor in possession under section 327(a). *See* 11 U.S.C. §§ 327(a) and 1203; Fed. R. Bankr. P. 2014(a) (debtor in possession, with the court's approval, employs professional). Yet, the Debtor was not eligible for relief under Chapter 12 as a matter of law and, therefore, it had no authority to employ Jensen under section 327(a). As such, Jensen should not be compensated under section 330(a). *See* 11 U.S.C. § 330(a) (compensation is awarded to professional employed under section 327(a)); *Interwest*, 23 F.3d at 318 (employment under section 327(a) is condition precedent to compensation award under section 330(a) (citing *In re Land*, 943 F.2d 1265, 1267-68 (10th Cir. 1991)). This analysis is especially compelling when one considers that the Debtor in possession filed an application seeking court approval of Jensen's employment which must have, implicitly or expressly, misrepresented its authority as a debtor in possession to employ Jensen. *See* Fed. R. Bankr. P. 2014(a). The Bankruptcy Court, which does not have an obligation to ferret out facts related to eligibility issues, entered an order approving Jensen's employment based on this implied or express misrepresentation. *See* 11 U.S.C. § 105(a); Fed. R. Bankr. P. 9024 (making Fed. R. Civ. P. 60(b) applicable in bankruptcy cases); *Cisneros v. United States (In re Cisneros)*, 994 F.2d 1462, 1464-66 (9th Cir. 1993) (bankruptcy court order vacating confirmation order was affirmed, with Ninth Circuit stating "[t]he bankruptcy court is, after all, a court of equity, and it strikes us as anomalous in this context to say that the Debtors have a right to retain that which they had no right to receive in the first place."); *In re John Clay and Co.*, 43 B.R. 797, 806-807 (Bankr. D. Utah 1984) ("A bankruptcy court has

continuous power to vacate or modify its own orders.").

Even if section 330(a) could be said to apply to this case, however, the Bankruptcy Court should be affirmed because Jensen did not meet his burden under any interpretation of section 330(a), even the one adopted by the majority. It is well-settled that the person seeking payment of an administrative expense claim under section 503(b)(2) for compensation and reimbursement of expenses under section 330(a) has the burden of proof as to the allowance of its claim. *General Am. Transp. Corp. v. Martin (In re Mid Region Petroleum, Inc.)*, 1 F.3d 1130, 1132 (10th Cir. 1993); *see Matter of Kenneth Leventhal & Co.*, 19 F.3d 1174, 1177 (7th Cir. 1994) (burden of proving entitlement to fees is, in all fee matters, on the applicant); *accord In re Gillett Holdings, Inc.*, 137 B.R. 475, 480 (Bankr. D. Colo. 1992); *In re TS Indus., Inc.*, 125 B.R. 638, 641 (Bankr. D. Utah 1991). Jensen, although given every opportunity to do so, simply failed to meet his burden and the Bankruptcy Court is being faulted by the majority for failing to do it for him. Slip Op. at 5 and 10-11. This shift of the burden from the applicant to the Bankruptcy Court is, perhaps, the most troubling aspect of the opinion.

Jensen filed a final Application with the Bankruptcy Court, which was objected to by several parties in interest. This Application was not considered during the Chapter 12 case. Subsequently, after the case was converted to a case under Chapter 7, a Stipulation was presented to the Bankruptcy Court which set the amount of Jensen's compensation and reimbursement of expenses. The United States Trustee objected to the Stipulation on the grounds that it should not be approved until Jensen's Application was approved by the Bankruptcy Court. At the hearing on the Stipulation, the Bankruptcy Court, effectively sustaining the United States Trustee's objection, requested that Jensen explain why he was entitled to compensation from the estate. Appellant's Appendix, Attachment 2, Transcript, p. 4. Jensen, knowing, based on the notice provided in the United

State Trustee's objection and the comments made by the Bankruptcy Court at the outset of the hearing, that his fees and expenses were at issue, summarily stated that his work benefited the estate because he prevailed in litigation on behalf of the Debtor and his services resulted in recoveries for the estate. *Id*. at 4-7. Jensen also indicated that the Debtor's administration of the case resulted in significant proceeds which all went to the Bank, the Debtor's secured lender. *Id*. at 6. After hearing this statement by Jensen and the comments of other parties in interest, the Bankruptcy Court explained that it would not approve the Stipulation because it did not think that Jensen was entitled to be paid by the estate for his services, *but* offered to set a hearing on Jensen's Application to allow him "to make a record." *Id*. at 14. Jensen declined to make that record. *Id*. at 14-15. Approximately two weeks after the hearing on the Stipulation, the Bankruptcy Court issued the order which is presently before us on appeal denying Jensen's Application in its entirety.

These facts demonstrate that Jensen did not meet his burden under section 330(a). As acknowledged by the majority, the record, which is Jensen's responsibility to establish, "contains no specific indication of why" prevailing on earlier litigation in the Bankruptcy Court was "reasonably likely to have benefitted the estate or [was] necessary to the administration of the case." Slip Op. at 10. A review of the transcript shows that Jensen did not even bother to discuss the specific services outlined in his Fee Application or to describe any tangible benefits which were likely to have accrued or which were necessary to the administration of the estate. Moreover, the narrative portion of the Application fails to describe with particularity why the services outlined therein may be compensable under section 330(a). *See* Appellant's Appendix, Attachment 3, Request for Payment of Attorney's Fees; *see also* Fed. R. Bankr. P. 2016(a); *Gillett Holdings*, 137 B.R. at 480 & n.8 (fee application and accompanying documentation should provide sufficient data on its face to enable

court to determine if section 330(a) has been met); *In re Jensen-Farley Pictures, Inc.*, 47 B.R. 557, 581 (Bankr. D. Utah 1985) (fee application should contain a narrative description of the proceedings, the problems involved, the difficulty of the problems, how each problem was resolved, and what results were achieved).[3] Finally, although given an opportunity to do so, Jensen declined to set a separate hearing on his Application, at which time he might have provided evidence and further argument in support of the Application. Based on this record, Jensen clearly did not meet his burden under section 330(a) of establishing an entitlement to compensation or reimbursement of expenses from the estate.

By failing to make a record in the Bankruptcy Court as to why he should be compensated, Jensen not only failed to meet his burden of proof under section 330(a), but also failed to meet his responsibility of making an adequate record for review for this Court. *See Deines v. Vermeer Mfg. Co.*, 969 F.2d 977, 979-80 (10th Cir. 1992) (if the evidentiary record is insufficient to permit assessment of appellant's claims of error, appellate court must affirm). It simply was not the Bankruptcy Court's responsibility to make that record for Jensen.

The majority states that "[a]t oral argument before this Court, Jensen indicated he was concerned that, under the circumstances, he would have been sanctioned for asking for a separate hearing on the Application." Slip Op. at 10.

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[3] The majority concludes that the Bankruptcy Court did not review the content of Jensen's Application to determine whether the services were necessary to the administration of the case, or to evaluate specific time entries. Slip Op. at 11. However, from the record before us, it is impossible to know whether the Bankruptcy Court reviewed the Application or not. Regardless, it is not important because the Application is part of the record on appeal and we may review its contents to determine if the Bankruptcy Court abused its discretion in denying the Application. *See, e.g., First Interstate Bank v. CIC Inv. Corp. (In re CIC Inv. Corp.)*, 192 B.R. 549, 544 (9th Cir. BAP 1996) (appellate court reviewed fee application to determine if bankruptcy court abused its discretion in allowing fees); *see generally Seibert v. State of Okla. ex rel. University of Okla. Health Sciences Ctr.*, 867 F.2d 591, 597 (10th Cir. 1989) (appellate court may affirm trial court's judgment on grounds not relied on by the trial court if supported by the record, provided the litigants have had a fair opportunity to develop the record). Since Jensen failed to create a record as to the particulars of his Application, even though given an opportunity to so, the Bankruptcy Court could only do the same.

This statement is wholly unsupported by the record. The Bankruptcy Court *offered* to set a separate hearing on Jensen's Application, stating that Jensen was "entitled" to one. Appellant's Appendix, Attachment 2, Transcript, p. 14. Jensen declined to set the hearing. *Id*. at pp. 14-15; Slip Op. at 6. He simply cannot come to this Court seeking redress for this error in judgment. More fundamentally, however, validation of Jensen's unsupported fears creates a dangerous precedent as to what this Court will consider: Should we allow well-settled rules regarding establishing a record to be ignored for every appellant who cries "I was scared of the Bankruptcy Judge?"[4]

Finally, although the Bankruptcy Court did not articulate each element of section 330 in its ruling, as an appellate court we may review the Bankruptcy Court's legal conclusions *de novo* and apply the undisputed facts to the appropriate legal standard to determine if an abuse of discretion has occurred. In so doing, even if the majority's interpretation of section 330(a) is applied, the undisputed facts and the record, viewed as a whole, along with the facts that Jensen had the burden to, but failed to, establish, indicate that the Bankruptcy Court simply did not abuse its discretion in denying Jensen's Application in its entirety.

Remand of this case to the Bankruptcy Court serves no purpose in that

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[4] The majority seems concerned that in offering to set a hearing on the Fee Application, the Bankruptcy Court stated: "Making the record, I can assure you, is not going to change my views, because I have to express those views in ruling on the stipulation." Appellant's Appendix, Attachment 2, Transcript, p. 14 (quoted in Slip Op. at 6). The intent of this statement is unclear. It may indicate what I have articulated above: Even if Jensen made a record to prove the elements of section 330(a), his fees and expenses would be disallowable as a matter of law because the Debtor was not eligible for relief under Chapter 12. On the other hand, even if this statement could be read as one in which the Bankruptcy Court was improperly pre-judging the case, Jensen had a remedy. He simply had to make his record, attempting in some way to meet his burden under section 330(a). After the Bankruptcy Court denied his fees and expenses in their entirety, Jensen would have had a much improved case for review on appeal. If the Bankruptcy Court sanctioned him for making a record, his appeal would have been more meritorious.

Jensen has already waived his right to establish a record as to the issues raised in the majority's opinion. Accordingly, the Bankruptcy Court is left with two options: (1) it can state that it has reviewed the Application, the transcript of the hearing on the Stipulation and the record of the case, and deny the Application because, as is readily apparent from the record before this Court, Jensen has not met his burden of establishing the elements of section 330(a) as it has been interpreted by the majority; or (2) it can order Jensen to do what he should have done in the first place--establish a record. Under either scenario the exercise is meaningless and only creates additional administrative expenses in the Chapter 7 case which will thereby further reduce the *pro rata* payment that Chapter 12 administrative expense claimants will receive. If the Bankruptcy Court exercises option (1) it will be doing what could have been done by this Court on the record before it. If option (2) is taken, Jensen will be afforded an opportunity to which he is not entitled.